Supreme Court, U.S.
FILED
SEP 6 2002
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(4)

No. 02-42

In the Supreme Court of the United States

OCTOBER TERM, 2001

Franchise Tax Board of the State of California,

Petitioner,

v.

Gilbert P. Hyatt and Eighth Judicial District Court of the State of Nevada,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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Brief of the States of Oregon, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, Commonwealths of N. Mariana Islands and Puerto Rico, Amici Curiae in Support of Petitioner

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QUESTION PRESENTED

Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of Article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?

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INTEREST OF *AMICI*

If followed by other states, the Nevada Supreme Court's decision in this case will infringe on the capacity of States to perform a core governmental function – that of assessing and collecting taxes. Because that infringement involves the very danger this Court warned about in *Nevada v. Hall*, 440 U.S. 410, 424 n. 24 (1979), *amici* urge this Court to grant California's petition for *certiorari*.

Like petitioner California, many *amici* States tax the income of their residents as well as the income of non-residents derived from in-state sources. This tax represents a major portion of the operating funds these States need to perform their essential governmental functions. As part of their tax collection and assessment efforts, these States, like California, conduct audits of former residents now living in other States, or of individuals or corporations residing out-of-state that derive income from doing business in their State, to determine the existence and extent of any tax obligation owed.[1]

Many *amici* States cannot be sued in their own state courts for their conduct or activities in connection with residency audits or other tax collection matters.[2] Oregon, for example,

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[1] Oregon, for example, annually conducts 120 to 150 audits of corporations doing business in Oregon but headquartered outside the State. The issues auditors review typically require out-of-state examination of corporate minutes and financial records. On the personal income tax side, Oregon audits nonresidents to determine the legitimacy of their non-residency status as well as claims of entitlement to special federal exemptions from state income taxes based on, *inter alia*, their employment with the airlines, barge companies or the federal government.

[2] Amici States with specific statutes retaining immunity as to claims involving the assessment and collection of taxes include: Hawaii (HAW. REV. STAT. ANN. § 662-15(2) (Michie 2002)); Idaho (IDAHO CODE § 6-904A(1) (Michie 1998)); Massachusetts (MASS. GEN. LAWS ANN. ch. 258, § 10(d) (West 1988 & Supp. 2002)); Minnesota (MINN. STAT. ANN. § 3.736, subd. (3)(C) (1998 & Supp. 2002), *but see, e.g.*, MINN. STAT. sec-

has retained its sovereign immunity from suits involving the collection and assessment of taxes. Under Article IV, section 24 of the Oregon Constitution, the State is immune from suit except as it consents to suit by general law. *Hale v. Port of Portland*, 308 Or. 508, 514-18, 783 P.2d 506 (1989). While Oregon has chosen to waive its sovereign immunity from suit for torts committed by its agencies and employees generally, it retained that immunity for claims involving certain types of conduct or activities. *See* OR. REV. STAT. § 30.265(3)(2001). Prominent among those claims for which it retained immunity is "any claim in connection with the assessment and collection of taxes." OR. REV. STAT. § 30.265(3)(b)(2001). *See Anderson v. Dept. of Rev.*, 313 Or. 1, 7, 828 P.2d 1001 (1992).[3]

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tions 270.275-.276 (1998 & Supp. 2002) (limitations on immunity)); Mississippi (MISS. CODE ANN. § 11-46-9(1)(I) (2002)); Nebraska (NEB. REV. STAT. § 81-8, 219(2) (1996)); Oklahoma (OKLA. STAT. ANN. tit. 51, § 155(11) (West 2000 & Supp. 2002)); South Dakota (S.D. CONST. art. III, § 27; S.D. CODIFIED LAWS §§ 21-32-16 to-18 (Michie 1987) §§ 3-22-10, -17) (Michie 1994)); Utah (UTAH CODE ANN. §§ 63-30-10(8), 59-1-704 (1997 & Supp. 2002)); Vermont (VT. STAT. ANN. tit. 12, § 5601(e)(2) (1973 & Supp. 2001)).

Amici States with general sovereign immunity statutes that may apply to claims involving the assessment and collection of taxes include: Alaska (ALASKA STAT. § 09-50-250 (Lexis 2000); Arkansas (ARK. CODE ANN. tit. 10, §§ 4011, 4012 (1999)); Illinois (745 ILL. COMP. STAT. 5/1) (1993); Indiana (IND. CODE §§ 34-13-2-1, -3-1, -4-1 (1999 & Supp. 2002)); Louisiana (LA. REV. STAT. ANN. § 42.1441.A (WEST 1990)); Maine (ME. REV. STAT. ANN. tit. 14, § 8103.1 (WEST 1980)); Wisconsin (WIS. STAT. ANN. § 893.80 (WEST 1997 & Supp. 2001)).

[3] In *Anderson*, the court observed that Oregon had enacted refund statutes by which disgruntled taxpayers could challenge what they believed to be the collection of improper taxes and that, in doing so, Oregon had waived its immunity in a limited sense. Thus, taxpayers who believe taxes have been collected from them in an invalid manner do have some recourse against the State.

If other States follow the Nevada Supreme Court's lead, Oregon and *amici* States that have retained tax-collection immunity will be subject to the jurisdiction of and liability in the courts of another State for performing a core governmental function. That is, their policy decision to retain their sovereign immunity means sovereign immunity only in their own courts and in federal courts, except to the extent they have consented to suit. The value of that immunity will be significantly impaired if they can be sued in Nevada or the courts of another State that — like Nevada — has decided to limit or abandon sovereign immunity for claims involving its own conduct.[4]

The mere possibility that States conducting residency-tax audits or other investigations of potential tax liability of nonresidents could be subject to this type of litigation in a foreign State literally sends chills down the spines of state tax administrators. All States face shrinking monetary resources. They must be vigilant in collecting every legitimate dollar of tax revenue. Taxpayers with the most to lose—like respondent Hyatt in the present case—have every incentive to follow respondent's lead, citing the Nevada court's decision, in an effort to forestall, if not thwart entirely, states' legitimate tax-collection efforts. States cannot afford to lose the revenue such investigations and tax audits produce; yet many cannot afford to become embroiled even in one drawn-out, expensive, audit-related lawsuit of the kind California faces in this case.[5]

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[4] Such concerns are not far fetched. Oregon currently is auditing a taxpayer claiming to have changed residency to Nevada prior to an $8 million dollar sale of stock. Fortunately, for now at least, the taxpayer is cooperating with the audit.

[5] California reportedly has incurred to date over $2.5 million in legal costs, including out-of-state attorney fees, defending this lawsuit. The *entire* legal services budget for the Oregon Department of Revenue for the

Only this Court can clarify whether a state's retention of sovereign immunity as to conduct involving core governmental functions is entitled to respect in the courts of another State. Without this Court's resolution of that question, States throughout the country likely will be called to answer and defend in foreign courts claims that they have misused or abused their authority in attempting to collect taxes due their States. This is costly, wasteful litigation that can be avoided only by this Court resolving the question now. *Amici* States thus urge the court to grant *certiorari* and clarify that a state's retained immunity from suit as to core governmental functions is entitled to respect in the courts of a sister State, regardless of the immunity-retention position taken by that sister State as to its own, similar conduct.

JURISDICTION

Although the Nevada Supreme Court's decision in this case contemplates that further proceedings will occur in the state's trial court, this Court's authorities make clear that the decision is nevertheless one over which this Court has jurisdiction. The state court's decision is a "final judgment" within the meaning of 28 U.S.C. § 1257(a) for at least two reasons.

First, the decision finally disposes of an original proceeding brought by California in the Nevada Supreme Court. *See, Fisher v. District Court*, 424 U.S. 832, 385 n. 7 (1976) (holding that a writ of supervisory control issued by the Montana Supreme Court is a final judgment for purposes of 28 U.S.C. § 1257 (3)); *Madruga v. Superior Court of California*, 346 U.S. 556, 557 n. 1 (1954) (holding that the California Supreme Court's judgment "finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."); *Bandini Co. v. Superior Court*, 284 U.S. 8,

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2001–03 biennium is $2.9 million, and most of that budget is required to provide legal support for its property tax program.

14-15 (1931) (same). *See also Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943) (accepting jurisdiction, without discussion, of California Supreme Court decision denying petition for writ of mandamus).

Second, the Nevada Supreme Court's decision fits the fourth of four categories of state-court decisions this Court identified in *Cox Broadcasting Corp v. Cohn,* 420 U.S. 469 (1975), as satisfying the finality requirement even though further proceedings were to take place in the state court. The fourth category is satisfied here because the court's decision fully decided the federal issue (*i.e.*, whether the Full Faith and Credit Clause barred Nevada courts from asserting jurisdiction over California under the circumstances presented), reversal of the Nevada judgment would preclude further litigation in the state's lower courts, and this Court's refusal to review the issue might seriously erode federal policy underlying the Full Faith and Credit Clause. *See Florida v. Thomas*, 532 U.S. 774 (2001) (explaining and applying the four categories of cases identified in *Cox Broadcasting*); *Flynt v. Ohio*, 451 U.S. 619, 620-622 (1981) (rejecting Flynt's argument that the Ohio Supreme Court's reversal on appeal of a trial court judgment dismissing state criminal complaints against him satisfied the fourth category, based on the Court's determination that there was "no federal policy that will suffer if the state criminal proceeding goes forward.") As discussed *infra*, subjecting California to the jurisdiction of and a trial in the State of Nevada, thereby causing California effectively to lose the benefit of its retention of immunity, will erode federal policies underlying the recognition of immunity.

ARGUMENT

1. In *Nevada v. Hall*, this court allowed California courts to assume jurisdiction over the State of Nevada in a tort claim arising from a State of Nevada employee's traffic accident with a California resident in California. In doing so this Court

rejected Nevada's argument that allowing California to assume jurisdiction over Nevada violated the Full Faith and Credit Clause. This Court further rejected Nevada's plea, also based on the Full Faith and Credit Clause, that California apply Nevada's $25,000 tort-claim limits rather than California's unlimited recovery statute. This Court concluded that California's assumption of jurisdiction and rejection of Nevada's tort-claim limits was permissible because doing otherwise would be "obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery," and, hence, not required by the Full Faith and Credit Clause. 440 U.S. at 424.

This Court, however, went out of its way to note that by exercising jurisdiction in that case, California was not posing a "substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424, n. 24. *Hall*, after all, involved only a traffic accident, and allowing such a case to proceed in California "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." *Ibid.* The Court added that it had "no occasion, in this case, to consider whether different state policies, either of California or of Nevada, might require a different analysis or a different result." *Ibid.* This Court thus implied that, were the lawsuit of a kind that would or might interfere with Nevada's capacity to fulfill its own sovereign responsibilities, a different result might obtain. At a minimum, however, this Court was clear that its decision did not signal how it would rule in a case where a foreign court's assumption of jurisdiction *would* interfere with another state's ability to carry out its core governmental duties.

The present case is that case.

In reaching its decision, however, the Nevada Supreme Court ignored *Hall's* cautionary footnote. The state court analyzed the Full Faith and Credit Clause issue as if California merely had been involved in an automobile accident in Nevada. That the acts of which plaintiff was complaining arose out of California's exercise of core governmental functions, and that the maintenance of this lawsuit in Nevada posed a severe drain on California's resources, thereby seriously impeding its ability to carry out those core functions, were of no consequence in the court's analysis. *Amici* submit that these factors not only are relevant in the proper analysis but, when properly considered, militate in favor of a result contrary to that reached by the Nevada Supreme Court. This case gives the Court the opportunity to explain the proper analysis to be employed when a State asserts that a foreign state's assumption of jurisdiction, or failure to respect the state's retained sovereign immunity, would adversely impact the state's ability to carry out its core governmental responsibilities.

2. State and other lower courts need guidance in the application of *Hall* and the Full Faith and Credit Clause in cases where those courts are asked to assume jurisdiction over other States in connection with their exercise of core governmental duties. Some state courts have construed the "cooperative federalism" language in *Hall* as an absolute jurisdictional bar to suits implicating another state's core governmental functions. For example, in *Guarini v. State of New York*, 521 A.2d 1362 , 1368 (N.J.Super.Ch.), *aff'd* 521 A.2d 1294 (N.J. Super.A.D. 1986), *cert. den.* 484 U.S. 817 (1987) (cited in California's petition for *certiorari*, p. 12), a New Jersey court declined to assert jurisdiction over a suit filed by New Jersey residents and politicians challenging New York's authority over the Statute of Liberty and various Hudson River islands. 521 A.2d at 1368. Although located closer to New Jersey's side of the river, those islands had been under New York's authority for more than 150 years pursuant to an 1834 Con-

gressionally approved compact between the two states. 521 A.2d at 1364. The *Guarini* court reasoned:

> Residents of New Jersey are attempting here to challenge the governmental authority of New York over territory which by interstate compact is under New York's jurisdiction. Permitting this suit would violate principles of cooperative federalism and interfere with New York's exercise of sovereign responsibilities pursuant to that interstate compact.

(citing *Hall*, 440 U.S. at 424, n. 24). *See also Struebin v. State of Illinois*, 421 N.W. 2d 874 (Iowa Supr.), *cert. den.* 488 U.S. 851 (1982) (*Struebin II*) (citing suit in *Guarini* as type of threat to cooperative federalism about which *Hall* warned); *State of Montana v. Gilham*, 133 F.3d 1133, 1138 (9th Cir. 1998) (assuming *Hall* extended to suits brought in tribal court, it did not apply to suit that "directly implicates the exercise of Montana's sovereign functions. Gilham would hold Montana liable for its governmental decisions concerning highway design. This is far different from *respondeat superior* tort liability, which would normally only have financial effect. Because the suit's theory would affect governmental processes, it falls outside the scope of *Nevada v. Hall*.").

At the other end of the spectrum are courts treating *Hall's* cautionary footnote as having no meaning at all. Such was the case in *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), *cert. den.* 469 U.S. 1159 (1985), which involved a high-speed police pursuit from Virginia to the District of Columbia, a subsequent auto accident, and a negligence action filed in a D.C. court by injured D.C. residents against the Virginia county. Based on footnote 24 in *Hall*, the Virginia county asserted immunity on the grounds that the plaintiffs' action "undermines [the county's] capacity to fulfill its law enforcement responsibilities." 738 F.2d at 1358. The D.C.

Circuit rejected that argument. First, it reasoned that the cited footnote in *Hall*

> does not in any respect limit the holding to the facts of that case. Nor does the footnote suggest that an exception must ever be made to the principles articulated in the opinion.

738 F.2d at 1358. Second, and in any event, the court indicated that the footnote would not have any impact here because the conduct of which plaintiff complained occurred outside Virginia's borders.

> * * * Arlington County itself expressly recognizes that its law enforcement interests weaken—and will yield to other interests—when it acts outside Virginia's borders. * * * The result is that the threat to the County's sovereignty is considerably less, and the threat to another entity's sovereignty is considerably greater than * * * where a state has acted only within its own borders. In sum, application of Virginia's policy would clearly frustrate District policies in favor of deterrence and compensation, and the facts of this case warrant no further inquiry into the meaning of the quoted footnote.

738 F.2d at 1358.

3. Providing state and other lower courts with guidance on these issues is timely, particularly in light of the profound concern that this Court has articulated since *Nevada v. Hall* for the sovereignty of states *vis a vis* the federal government. *See Alden v. Maine*, 527 U.S. 706 (1999) (Congress by authorizing private actions against non-consenting States in state court under the Fair Labor Standards Act unconstitutionally abrogated state sovereign immunity); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (same regarding actions in federal court un-

der the Federal Trademark Remedy Clarification Act); *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000) (same regarding the federal Age Discrimination in Employment Act); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (acknowledging the inapplicability of the *Ex Parte Young* doctrine in actions implicating special sovereign interests). *See also Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. ___, 122 S. Ct. 1864, 1874 (2002) (state sovereign immunity "bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State.") Against the backdrop of these cases, it is appropriate for this Court to revisit *Nev da v. Hall*, not necessarily for the purpose of overruling t.at decision, but for examining whether in light of the renewed emphasis on state sovereignty the Full Faith and Credit Clause, under some circumstances at least, mandates that a foreign State give full credit to a sister state's retention of its sovereign immunity.

Not only is it in the interests of other States to have this Court examine the issue presented in this case now, it is in California's interests as well. One perhaps overarching reason for a state's retention of immunity for conduct involving core governmental functions is to prevent state officials engaged in that conduct from altering their behavior out of fear of becoming embroiled in litigation that takes them away from their governmental duties. If a decision denying immunity cannot be reviewed pre-trial, the immunity is "effectively lost." *See, e.g., Mitchell v.* Forsyth, 472 U.S. 511, 526-27 (1985) ("The reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable" – *i.e.*, the "entitlement is immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.") *Cf Federal Maritime Comm'n v. South Carolina Ports Authority*, 122 S. Ct. 1877 (sovereign immunity "provides an immunity from suit" and "does not merely constitute a defense to monetary liability or even to all types of liability."); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf Eddy, Inc.*, 506 U.S 139, 146 (1993) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

The Nevada Supreme Court's refusal to give due respect to California's retained immunity has caused California to expend significant financial resources and to divert officials and employees from their primary governmental duties in order to defend against respondent Hyatt's claims. That expense and consequent reduction in service to the citizens of California will only continue to mount if California is required to defend against these claims on the merits. Only by agreeing to resolve the issue presented now can this Court give California some practical relief.

4. For cooperative federalism to flourish, it is critical that States give due respect to other states' decisions to retain immunity from suit regarding core governmental activities. *Amici* believe that the majority in *Nevada v. Hall* included footnote 24 to recognize the fundamental importance to cooperative federalism of States not infringing on the "capacity" of other States to fulfill their own "sovereign responsibilities," and to respond to concerns that failing to give due respect in such cases would increase the opportunity and likelihood of retaliation. *See Nevada v. Hall*, 440 U.S. at 429 (Blackmun, J., dissenting) ("States in all likelihood will retaliate against one another for respectively abolishing the 'sovereign immunity' doctrine."); *id.* at 443 (Rehnquist, J., dissenting) (States will "try to isolate assets from foreign judgments and generally reduce their contacts with other jurisdictions."). The failure of States to recognize other states' retention of immunity as to conduct involving core governmental functions will

likely cause affected States to be less cooperative in their dealings with, and perhaps less trustful of, those States. These consequences are the antithesis of cooperative federalism.

Unless this Court intervenes now, certainly some—perhaps many—taxpayers will follow respondent Hyatt's path and seek to block states' legitimate tax collection efforts, hoping that by dragging States through the judicial processes of foreign courts States will forego those efforts. The Nevada Supreme Court's decision provides a roadmap for disgruntled taxpayers and other state courts to follow. While other courts faced with having to process these cases may ultimately disagree with the Nevada Supreme Court's decision, still the process itself, as is evident in this case, will be time-consuming, expensive and detrimental to states' ability to perform this core governmental responsibility.

CONCLUSION

The question raised in this case is squarely presented and, so far as *amici* States are aware, free of procedural irregularities. *Amici* implore the Court to grant *certiorari* and reverse the decision of the Nevada Supreme Court.

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